No. 95-1016

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Eighth Circuit correctly reverse the judgment in favor of the petitioner on her state-law tort claim for bad faith refusal to settle when the Eighth Circuit determined that the petitioner had no such claim as a matter of Missouri law?

2. Did the Eighth Circuit correctly determine that the petitioner's tort claim for bad faith refusal to settle did not lie under Missouri law because Missouri law did not impose on the defendant car rental company a fiduciary duty to settle a claim against a renter when the defendant had not reserved to itself in its car rental contract the exclusive right to accept an offer to compromise a claim and settle all claims?

3. Did the Eighth Circuit correctly conclude that the petitioner, as the purported assignee of the renter's state-law tort claim for bad faith refusal to settle, had no such claim because such a claim is not assignable as a matter of Missouri law?

4. Did the Eighth Circuit correctly reverse the district court's award of tort-based damages (including punitive damages), and correctly direct the district court to enter judgment only for the amount of contract damages allowable under Missouri law, when the Eighth Circuit reversed the judgment below on the petitioner's tort claim and affirmed only on the petitioner's breach of contract claim?

STATEMENT PURSUANT TO RULE 29.6

Respondent National Auto Credit, Inc., formerly known as Agency Rent-A-Car, Inc., has no parent corporation and no non-wholly-owned subsidiaries.

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CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

No constitutional provision is involved. This is a diversity case involving only issues of Missouri law.

The Eighth Circuit's direction of the entry of the appropriate judgment was authorized by 28 U.S.C.§ 2106, which reads as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Petitioner's tortured reading of the Eighth Circuit's opinion grossly mischaracterizes what the appellate court held in an effort to manufacture constitutional issues where none exist. A fair reading of that opinion (reported at 65 F.3d 741) shows that the Eighth Circuit did not reverse any finding of fact implied by the jury verdict or substitute its own, and did not deprive petitioner of due process or equal protection. The court merely held that petitioner had no bad faith tort claim as a matter of Missouri law. Likewise, the appellate court's reduction of the damage award to the amount of contract damages allowable under Missouri law on the petitioner's breach of contract claim, on which judgment was affirmed, was not "without explanation" but was soundly based on the

reversal of the judgment on the petitioner's tort claim. (Pet. App. 5, 8-13.)

In the decision below, the Eighth Circuit analyzed Missouri law and Agency's car rental contract and held that the trial court erred, as a matter of law, in failing to grant Agency's motions for judgment as a matter of law on the petitioner's alleged tort claim for bad faith refusal to settle, on two different legal grounds. (*Id.*). First, the appellate court determined, as a matter of law, that Agency's car rental contract did not reserve to Agency the *exclusive* right to settle claims against its renter, and therefore that under Missouri law, Agency did not have a fiduciary duty to settle such claims. Accordingly, the court held that the petitioner had no bad faith tort claim, as a matter of Missouri law, because Agency could not have breached a duty which it did not have. (Pet. App. 8-11; *see also* Pet. App. 38-39.)

Second, the Eighth Circuit held that the petitioner, as the purported assignee of the renter's alleged tort claim for bad faith refusal to settle, had no such claim on which to sue, as a matter of law, because the renter's alleged tort claim for bad faith refusal to settle was not assignable to the petitioner under Missouri law. (Pet. App. 11-12.) Therefore, Agency was entitled to judgment as a matter of law on the petitioner's alleged bad faith tort claim on both grounds. (Pet. App. 12.)

Because the Eighth Circuit determined that the judgment below included tort damages (including punitive damages), and the petitioner had no tort claim under Missouri law, the appellate court consequently reversed the damage award as well. (Pet. App. 5, and n.3, 7, 13.) But since the appellate court affirmed the judgment for the petitioner on her breach of contract claim (Pet. App. 6-7), the court directed the district court to enter judgment for the amount of contract damages

allowable under Missouri law based on Agency's contractual limit of liability. (Pet. App. 7, 13.)

Additionally, petitioner asserts incorrectly that Agency did not complain of the district court's errors in the district court or on appeal. (Pet. 8-9, 16.) In fact, Agency moved for judgment as a matter of law at the close of the petitioner's evidence, and at the close of all evidence, on the same grounds on which the Eighth Circuit reversed (except assignability). (Resp. App. 1a-8a; *see* Pet. App. 5.) Agency again raised these grounds in its motion for a new trial or for judgment as a matter of law. (Resp. App. 9a-10a; *see* Pet. App. 5.) Finally, Agency raised all of the grounds on which the Eighth Circuit reversed in its briefs in that court. (Resp. App. 11a-44a.))

REASONS FOR DENYING WRIT

I.

THIS CASE PRESENTS NO CONSTITUTIONAL QUESTION BUT ONLY QUESTIONS OF MISSOURI LAW.

Petitioner has bent, twisted, and warped the decision of the appellate court in an effort to force it into a constitutional mold. The simple truth, however, is that neither the Seventh Amendment right to a jury trial nor the Fourteenth (actually Fifth) Amendment right due process or equal protection is implicated here at all. The cases cited by the petitioner to support her constitutional arguments (Pet. 9-10, 14, 15, 17) are not on point.

A. The Seventh Amendment Right To A Jury Trial Is Not Implicated Because The Eighth Circuit Reversed On Questions Of Missouri Law, Not On Issues Of Fact.

In reversing the judgment below on the bad faith tort claim, the Eighth Circuit did not reverse any implied finding of fact by the jury, or substitute any factual finding of its own. On the contrary, the appellate court, after analyzing Missouri law and the car rental contract involved in this case (Pet. App. 9-11), concluded that the alleged bad faith tort claim simply did not lie and was not assignable as a matter of law. (Pet. App. 11.)

These determinations were legal determinations based upon Missouri law and the language of the particular contract involved. (Pet. App. 9-11.) No finding of fact implied by the jury verdict was reversed, and no finding of fact of its own was substituted by the Eighth Circuit. Consequently, the Seventh Amendment right to a jury trial is not implicated at all. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322, *reh'g denied*, 386 U.S. 1027 (1967) (appellate court's grant of judgment *n. o.v.*, after reversing trial court's denial of judgment *n. o. v.*, does not violate Seventh Amendment right to jury trial). *See Galloway v. United States*, 319 U.S. 372, 388-93, 396, *reh'g denied*, 320 U.S. 214 (1943) (directed verdict does not violate Seventh Amendment); *Hepner v. United States*, 213 U.S. 103, 115 (1908) (same); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate Seventh Amendment); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335-37 (1979) (application of collateral estoppel does not violate Seventh Amendment); *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (no right to jury trial where no issues of fact to be determined).

Nor is the Seventh Amendment right to a jury trial implicated by the Eighth Circuit's reversal of the damage

award and its instructions to enter judgment in a specified amount. The judgment below was based on both the bad faith tort claim and a breach of contract claim, and included both contract and tort damages, including punitive damages. (Pet. App. 4-5 & n.3.) As a result of the reversal of the judgment based on the petitioner's bad faith tort claim, the Eighth Circuit correctly reversed the damage award insofar as it included tort-based damages, and instructed the district court to enter judgment in the amount of contract damages allowable under Missouri law on the breach of contract claim for failure to defend (see discussion below at p. 10), the judgment on which claim alone was affirmed. (Pet. App. 5, n. 3, 6-7, 13.) 28 U.S.C. § 2106; *Insurance Co. v. Piaggio*, 83 U.S. 378, 386-388 (1873); *Davis v. Omitowoju*, 883 F.2d 1155, 1159-65 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Garrett v. Faust*, 183 F.2d 625, 629 (3d Cir. 1950), *cert. denied*, 340 U.S. 931, *reh'g denied*, 341 U.S. 917, 933 (1951).

Because the amount of damages to be awarded on the breach of contract claim was limited under Missouri law to the contractual limit of liability (*id.*) and that amount was undisputed (Pet. App. 4-5), the correct amount of damages on the breach of contract claim was simply a question of the application of law to fact by the court, and not a question of fact for the jury. *Insurance Co.*, 83 U.S. at 386-88; *Davis*, 883 F.2d at 1159-65; *Boyd*, 877 F.2d at 1196; *Garrett*, 183 F.2d at 629. Again, the Seventh Amendment right to a jury trial was not implicated.

B. The Fifth Amendment Right To Due Process And Equal Protection Are Not Implicated.

Although the petitioner purports to rely on the Fourteenth Amendment due process and equal protection clauses, it is plain from its terms and well-established case law that the

Fourteenth Amendment applies only to the states, and not to the federal government. U.S. Const. Amend. XIV, § 1; *District of Columbia v. Carter*, 409 U.S. 418, 423-24, *reh'g denied*, 410 U.S. 959 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Since the action about which the petitioner complains was taken by a federal court, it is actually the Fifth Amendment due process clause which would be applicable if any due process or equal protection right were implicated. U.S. Const. Amend. V; *see District of Columbia*, 409 U.S. at 424; *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Bolling*, 347 U.S. at 499; *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). None is, however. Indeed, the petitioner did not raise a due process claim in the Eighth Circuit (*see* Pet. App. 60-76) although she attempts to do so now. (Pet. 14, 15-16.)

1. The Eighth Circuit's Judicial Determination That Petitioner's Purported Bad Faith Tort Claim Did Not Exist As A Matter Of Law Accorded Petitioner Full Due Process And Did Not Deprive Her Of A Property Interest.

The Eighth Circuit's legal determination that a tort claim for bad faith refusal to settle did not exist as a matter of Missouri law did not deprive the petitioner of any property right without due process of law for two reasons. First, the petitioner does not have any "property interest" in a purported legal claim which does not exist as a matter of state law. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 577 (1972) (mere unilateral expectation is not a property interest protected by due process; property interests are created and defined by existing rules or understandings from a source, such as state law, that secure certain benefits and support claims of entitlement to them); *see Martinez v. California*, 444 U.S. 277, 282 and n. 5, *reh'g denied*, 445 U.S. 920 (1980); *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979).

Second, the petitioner was accorded full due process in the Eighth Circuit, and has pointed to no element of due process—notice, a hearing, an unbiased decision-maker—that was denied her by the appellate court. *See generally, Dixon v. Love*, 431 U.S. 105, 113-14 (1977). The petitioner's real complaint is that the appellate court rejected her legal arguments; but that is not a denial of due process. *See generally, Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-32 (1988) (even erroneous construction of state law by court does not deny due process); *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 91-92 (1978) (no denial of due process where petitioner's arguments were considered).

2. The Eighth Circuit's Limitation Of Petitioner's Damages On Her Contract Claim For Failure To Defend To Those Allowable By Missouri Law Did Not Deny Her Equal Protection.

Nor is the Eighth Circuit's instruction to the district court to enter judgment in the amount of contract damages allowable under Missouri law on the petitioner's contract claim for failure to defend, the judgment on which claim alone was affirmed, a denial of equal protection. The measure of damages on a contract claim for failure to defend is prescribed by Missouri law. See below p. 10. The appellate court's holding that the petitioner was limited to that measure of damages on her contract claim did not deny her equal protection. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82-88 and n. 32, *reh'g denied*, 439 U.S. 884 (1978) (sustaining limitations on compensatory damages for tort claims in certain circumstances); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (upholding limitation of damages for wrongful death on high seas to pecuniary damages and therefore eliminating loss of society damages). Indeed, another appellate court has described a similar equal

protection argument as "puerile." *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 916, n. 3 (1st Cir. 1992).

Accordingly, this case presents no issue of constitutional law to be decided by the Court. It presents only matters of Missouri law which were correctly decided by the appellate court.

II.

THE EIGHTH CIRCUIT CORRECTLY DECIDED THIS CASE UNDER THE APPLICABLE MISSOURI LAW, SO THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWERS OVER THE APPELLATE COURT.

Under Missouri law, a tort action for bad faith failure to settle a claim requires a particular balance of power between the parties to a contract: only when one party assumes *exclusive* control of the right to settle claims does that party have the duty to exercise good faith in considering offers to compromise a claim. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W. 2d 554, 556 (Mo. App. 1990). As a result, a tort claim for bad faith refusal to settle does not lie unless the defendant reserved to itself the *exclusive* right to accept an offer to compromise a claim and to settle a dispute. *Id.* at 557; *Zumwalt v. Utilities Ins. Co.*, 228 S.W. 2d 750, 753 (Mo. 1950). The Eighth Circuit correctly so held, citing *Ganaway* and *Zumwalt*. (Pet. App. 9.)

The Eighth Circuit compared the language of the *insurance contract* in *Ganaway* to the *car rental contract* involved in this case and determined, as a matter of law, that Agency had *not* reserved to itself the *exclusive* right to settle in this case. (Pet. App. 9-11.) As a result, the court concluded, as

a matter of law, that "Agency lack[ed] the total control over the settlement process which would be necessary to impose upon Agency the duty to settle in good faith." (Pet. App. 11.) The appellate court, therefore, held that "[b]ecause Agency did not have the exclusive right to settle claims arising from [the renter's] use of its rental car, Agency did not have a fiduciary duty to give good faith consideration to offers to settle" and therefore "could not have breached a fiduciary duty it did not have." (*Id.*) This holding is correct under the applicable Missouri law. *Ganaway, supra,* and *Zumwalt, supra*. There is, therefore, no need for this Court to exercise its supervisory jurisdiction over the Eighth Circuit.

The same is true for the Eighth Circuit's additional holding that the petitioner had no bad faith tort claim on which to sue because such claim (which purportedly had been assigned to her) was not assignable under Missouri law and therefore the purported assignment of such claim to her was invalid as a matter of law. (Pet. App. 11-12.) The general rule in Missouri is that personal injury actions are not assignable. *Beall v. Farmers' Exch. Bank*, 76 S.W. 2d 1098, 1099 (Mo. 1934); *Freeman v. Berberich*, 60 S.W. 2d 393, 401 (Mo. 1933); *Property Exch. & Sales, Inc. v. Bozarth*, 778 S.W. 2d 1, 2 n. 1 (Mo. App. 1989); *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W. 2d 208, 217 (Mo. App. 1967). *See also Eastern Atl. Transp. & Mach. Eng'g, Inc. v. Dingman*, 727 S.W. 2d 418, 423 (Mo. App. 1987). *But see Ganaway*, 795 S.W. 2d at 565.

Although the petitioner relies on *Ganaway* and other cases for her argument to the contrary (Pet. 14-15), the other cases either are not on point, involve the law of a different state, or actually support the Eighth Circuit's holding. *Ganaway* involved an assignment of a bad faith tort claim by a bankruptcy trustee under the 1978 Bankruptcy Act. While the

Ganaway court stated that the "general law" also allowed such an assignment, that court cited no Missouri case to that effect (795 S.W. 2d at 565), and such statement is overwhelmingly contradicted by the Missouri cases cited above. As a result, the Eighth Circuit correctly decided not to follow *Ganaway*. *Forsthove*, 416 S.W. 2d at 213.

Finally, the Eighth Circuit correctly reversed the damage award and instructed the district court to enter judgment in the amount of damages allowable under Missouri law on the petitioner's breach of contract claim. Under Missouri law, the damages that may be awarded on a contract claim for failure to defend are limited to the contractual limit of liability, plus attorney fees, other defense costs, and interest where the plaintiff defended the underlying suit and paid the underlying judgment at his own expense. *See Zumwalt*, 228 S.W. 2d at 753, 756; *Landie v. Century Ins. Co.*, 390 S.W. 2d 558, 562, 564, 565 (Mo. App. 1965); *Southwestern Bell Tel. Co. v. Western Casualty & Sur. Co.*, 269 F. Supp. 315, 318 (E.D. Mo. 1967), *modified*, 396 F.2d 351, 355 (8th Cir. 1968). In this case, Agency's liability was limited by contract to $25,000 (Pet. 4-5; Pet. App. 38); attorney fees, other defense costs, and interest were not an issue since the petitioner's assignor (the renter) did not defend the case or pay the judgment. (Pet. 5-7.)

The cases cited by the petitioner for "[t]he general rule on the measure of damages" (Pet. 11) are not on point and have no application here. One is a civil rights action under federal law. The other two, although involving breach of contract, do not deal with a contract to defend and indemnify, like the one involved here. For such contracts Missouri has developed a special rule that limits damages to the contractual limit of liability, plus attorney fees, other defense costs, and interest incurred by the plaintiff in defending the underlying suit and paying the underlying judgment. *See Zumwalt, supra*; *Landie, supra*; and *Southwestern Bell, supra*.

Accordingly, the Eighth Circuit's decision in this case is correct under Missouri law, and there is no need for this Court to exercise its supervisory powers over the appellate court.

III.

THERE IS NO CONFLICT WITH OTHER CIRCUITS, WITHIN THE EIGHTH CIRCUIT, OR WITH MISSOURI LAW AS TO THE PROPER MEASURE OF DAMAGES: ANY APPARENT CONFLICT RESULTS FROM THE APPLICATION OF THE DISPARATE LAW OF DIFFERENT STATES IN DIVERSITY ACTIONS, OR FROM THE DIFFERENT CLAIMS INVOLVED IN EACH CASE.

The asserted conflict between the Eighth Circuit's decision on the appropriate measure of damages on a contract claim for failure to defend in this case and the decisions of other circuits in other cases (Pet. 12) is only apparent, and not real. A review of the cases relied on by the petitioner to establish the purported conflict reveals that they were all diversity cases decided, respectively, under Texas, California, Illinois, North Carolina, and Kansas law. This case, however, was decided under Missouri law. Thus, any apparent conflict between the circuits is the result of the application of the disparate law of different states, and not the result of any inconsistency among the circuits requiring conformation by a decision of this Court.

Moreover, none of those cases are even on point. *Consolidated Amer. Ins. Co. v. Mike Soper Marine Servs.*, 951 F.2d 186 (9th Cir. 1991), and *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128 (D.C. Cir. 1989), both affirmed awards of damages in excess of the contractual liability limits, not on a contract claim for failure to defend, but on a tort claim for bad

faith refusal to settle. *Consolidated Amer.*, 951 F.2d at 190; *Gray*, 871 F.2d at 1130. Similarly, *Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 762-64 (7th Cir. 1986), and *Coleman v. Holecek*, 542 F.2d 532, 534, 536-38 (10th Cir. 1976), allowed an award of damages in excess of the contractual limit of liability only where there was fraud, bad faith, or negligence in failing to settle. Here, of course, the Eighth Circuit held that the petitioner had no tort claim for bad faith refusal to settle. This difference is critical as the Missouri courts have recognized in *Zumwalt, supra*; *Landie, supra*; and *Southwestern Bell, supra*; which are discussed above. In *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1129, *reh'g en banc denied*, 992 F.2d 326 (5th Cir. 1993), the court reversed a summary judgment for the insured, and rendered judgment for the insurer. It did not even discuss the measure of damages.

Nor is there any conflict between the Eighth Circuit's decision in this case and the other Missouri or Eighth Circuit decisions cited by the petitioner. *Landie* involved both a contract claim for failure to defend and a tort claim for bad faith refusal to settle. 390 S.W. 2d at 561, 563. The court held that the damages on the contract claim for failure to defend were limited to the contractual limit of liability, plus attorney fees, other defense costs, and interest the plaintiff had incurred in defending the underlying case, but that damages on the tort claim for bad faith refusal to settle could exceed the contractual limit of liability. *Id.* at 562-66. Only because the court found that the jury could have found that the insurance company refused to settle in bad faith did the court affirm the judgment for damages in excess of the contractual limit of liability. *Id.* at 566.

In *Fuller v. Lloyd*, 714 S.W. 2d 698, 700 (Mo. App. 1986), there was no discussion of the contractual limit of liability, and

it seems apparent that the judgment on the contract claim for failure to defend did not exceed any contractual limit since that judgment was only for $25,000—the minimum amount of insurance coverage required by Missouri's Financial Responsibility Law. R.S. Mo. § 303.190(2)(2) (Pet. App. 29). The additional amount awarded to the insured was not for failure to defend but for wrongful denial of coverage which caused the insured to lose his driver's license. 714 S.W. 2d at 702. No similar claim was involved in our case.

Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, *cert. denied*, 414 U.S. 856 (8th Cir. 1973), presents no conflict for two reasons. First, even though it also was decided by the Eighth Circuit, *Luke* was decided under South Dakota law, not under Missouri law. *Id.* at 1018-22, 1023. Second, the damage award was affirmed in *Luke* based on the insurance company's bad faith refusal to settle, not on a contract claim for failure to defend, and based on a specific South Dakota statute prescribing the measure of damages. *Id.* at 1020-21, 1023.

Carpenter v. Automobile Club Interinsurance Exch., 58 F.3d 1296 (8th Cir. 1994), likewise presents no conflict. It was decided under Arkansas law, not Missouri law, and was a bad faith refusal to settle case, not a breach of contract failure to defend case. *Id.* at 1302-03. As a result, there is no conflict for this Court to resolve.

CONCLUSION

This case presents no constitutional question, no conflict between circuits, within the Eighth Circuit, or with Missouri law, and no need for this Court to exercise its supervisory power over the Eighth Circuit. This case presents only questions of Missouri law, which were correctly decided by the Eighth Circuit. Accordingly, the writ should be denied.

Respectfully submitted,

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APPENDIX A — DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

JUDGMENT AS A MATTER OF LAW

Comes now defendant, Agency Rent-A-Car, and pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure moves this court for Judgment as a Matter of Law on plaintiffs' complaint in that there is no legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on any issues in their Complaint and for further grounds states as follows:

FACTS

Plaintiffs' entire case is based on their allegation that the rental agreement required that a policy of insurance be provided to Kendrick Wilhite or that Agency Rent-A-Car Inc.,

is or should be treated as an automobile liability insurance company. Plaintiffs have failed to prove and, in fact, there has been no evidence whatsoever that defendant ever had a duty to provide a policy of automobile insurance.

Additionally, plaintiffs' recovery depends on a duty owed by a liability insurance company to its insured under a policy of automobile liability insurance. Plaintiffs have not presented any evidence that Agency Rent-A-Car was a automobile liability insurance company or that Kendrick Wilhite was a policy owner or an insured under any policy of insurance.

Plaintiffs' claim for bad faith and refusal to settle is a tort arising out of the actions of an automobile liability insurance company in dealing with its insureds. The tort of bad faith does not exist as such through any other relationship arising out of any other contract than that between an automobile insurance company and insured. Plaintiff has not presented any evidence supporting a duty on the part of Agency Rent-A-Car to have settled the claims against Kendrick Wilhite prior to a judgment being entered.

LAW AND ARGUMENT

Section 379.110 of the Revised Statutes of Missouri defines an insurer under the section which governs and regulates insurance companies other than life insurance companies.

Subparagraph (1), of that section defines insurer as "any insurance company, association or exchange authorized to issue policies of automobile insurance in the State of

Missouri." The Eighth Circuit Court of Appeals has held that private indemnity agreements collateral to the main business or transaction between the parties is not an insurance contract. *St. John's Regional Health Center v. American Casualty Company of Reading, Pennsylvania*, 980 F.2d 1222 (8th Cir 1992).

Further, in Missouri, it is clear that a certificate of self insurance filed with the state in compliance the financial responsibility laws does not require the defendant to assume all the obligations of a liability insurance company. *American Family Mutual Insurance Co. v. Missouri Power and Light Co.*, 517 S.W. 2d 110 (Mo banc 1975).

There is no Missouri case which imposes liability for the tort of bad faith on any entity other than an insurance company for its dealings with its insured. Since plaintiff has not presented any evidence that Agency Rent-A-Car is an insurance company or that there was a policy of insurance entered into between plaintiff's assignor, Kendrick Wilhite, and Agency Rent-A-Car, there can be no tort of bad faith in the dealings between the two entities and defendant is entitled to judgment as a matter of law on plaintiff's claim of bad faith under this theory.

Plaintiff's claim for punitive or exemplary damages should be dismissed in that there is no cause of action recognized in Missouri for punitive damages arising strictly from a breach of contract action and plaintiff has not presented any evidence to support the allegation that Agency Rent-A-Car is an insurance company subject to the provisions of the tort of bad faith or punitive or exemplary damages arising therefrom.

Appendix A

As to plaintiff's claim for breach of contract, defendant is also entitled to judgment as a matter of law. Plaintiffs have not presented any evidence that there was a breach of any duty owed to Kendrick Wilhite under the rental agreement. Kendrick Wilhite, as indemnitee, has not been called on to pay any amount of the judgment and the rental contract specifically states that Agency Rent-A-Car will pay up to $25,000 of any amount that Kendrick Wilhite is required to pay by way of judgment or settlement.

Moreover, any damage to Kendrick Wilhite was due to his own breach in failing to notify Agency of the summons and complaint served on him and his failure to appear on the date indicated to protect his own interest and the interest of the indemnitor, Agency Rent-A-Car Inc. as required in the rental agreement.

Wherefore, Agency Rent-a-Car Inc., moves this court for Judgment as a Matter of Law on plaintiff's claims of breach of Contract, Bad Faith, and Tortious Breach of Contract, and for its costs and attorney's fees herein expended pursuant to the rental agreement.

s/ Kenneth A. Slavens
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APPENDIX B — EXCERPTS OF DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF ALL THE EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF ALL THE EVIDENCE

Comes now defendant, Agency Rent-A-Car, and pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure moves this court for Judgment as a Matter of Law on plaintiffs' complaint in that there is no legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on any issues in their Complaint and for further grounds states as follows:

FACTS

Plaintiffs' entire case is based on their allegation that the rental agreement required that a policy of insurance be

provided to Kendrick Wilhite or that Agency Rent-A-Car Inc., is or should be treated as an automobile liability insurance company. Plaintiffs have failed to prove and, in fact, there has been no evidence whatsoever that defendant ever had a duty to provide a policy of automobile insurance.

Additionally, plaintiffs' recovery depends on a duty owed by a liability insurance company to its insured under a policy of automobile liability insurance. Plaintiffs have not presented any evidence that Agency Rent-A-Car was a automobile liability insurance company or that Kendrick Wilhite was a policy owner or an insured under any policy of insurance.

Plaintiffs' claim for bad faith and refusal to settle is a tort arising out of the actions of an automobile liability insurance company in dealing with its insureds. The tort of bad faith does not exist as such through any other relationship arising out of any other contract than that between an automobile insurance company and insured. Plaintiff has not presented any evidence supporting a duty on the part of Agency Rent-A-Car to have settled the claims against Kendrick Wilhite prior to a judgment being entered.

LAW AND ARGUMENT

Section 379.110 of the Revised Statutes of Missouri defines an insurer under the section which governs and regulates insurance companies other than life insurance companies.

Subparagraph (1), of that section defines insurer as "any insurance company, association or exchange authorized to

issue policies of automobile insurance in the State or Missouri." The Eighth Circuit Court of Appeals has held that private indemnity agreements collateral to the main business or transaction between the parties is not an insurance contract. *St. John's Regional Health Center v. American Casualty Company of Reading, Pennsylvania*, 980 F.2d 1222 (8th Cir 1992).

Further, in Missouri, it is clear that a certificate of self insurance filed with the state in compliance the financial responsibility laws does not require the defendant to assume all the obligations of a liability insurance company. *American Family Mutual Insurance Co., v. Missouri Power and Light Co.*, 517 S.W. 2d 110 (Mo banc 1975).

There is no Missouri case which imposes liability for the tort of bad faith on any entity other than an insurance company or its dealings with its insured. Since plaintiff has not presented any evidence that Agency Rent-A-Car is an insurance company or that there was a policy of insurance entered into between plaintiff's assignor, Kendrick Wilhite, and Agency Rent-A-Car, there can be no tort of bad faith in the dealings between the two entities and defendant is entitled to judgment as a matter of law on plaintiff's claim of bad faith under this theory.

Plaintiff's claim for punitive or exemplary damages should be dismissed in that there is no cause of action recognized in Missouri for punitive damages arising strictly from a breach of contract action and plaintiff has not presented any evidence to support the allegation that Agency Rent-A-Car is an insurance company subject to the provisions of the tort of bad faith or punitive or exemplary damages arising therefrom.

Appendix B

As to plaintiff's claim for breach of contract, defendant is also entitled to judgment as a matter of law. Plaintiffs have not presented any evidence that there was a breach of any duty owed to Kendrick Wilhite under the rental agreement. Kendrick Wilhite, as indemnitee, has not been called on to pay any amount of the judgment and the rental contact specifically states that Agency Rent-A-Car will pay up to $25,000 of any amount that Kendrick Wilhite is required to pay by way of judgment or settlement.

* * *

APPENDIX C — EXCERPTS OF DEFENDANT'S MOTION FOR A NEW TRIAL OR IN THE ALTERNTIVE FOR JUDGMENT AS A MATTER OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

DEFENDANT AGENCY RENT-A-CAR INC.'S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT AS A MATTER OF LAW

Comes now defendant, Agency Rent-A-Car, and pursuant to Rules 59 and 50 of the Federal Rules of Civil Procedure moves this court to set aside and hold for naught the verdict and judgment entered in favor of plaintiff and against defendant, and grant a new trial, or in the alternative, enter judgment as a matter of law on behalf of Defendant, and for grounds therefore states as follows:

1. The court erred in denying defendant's Motion for a Judgment as a Matter of Law in its favor at the close of

plaintiff's case because, as a matter of law, plaintiff is not entitled to recover as more fully set out in the motion.

2. The court erred in denying defendant's Motion for a Judgment as Matter of Law in its favor at the close of all the evidence because, as a matter of law, plaintiff is not entitled to recover as more fully set out in the motion.

3. The evidence is insufficient to support a finding in favor of plaintiff and against defendant.

4. Defendant is entitled to judgment in its favor as a matter of law.

5. The verdict is contrary to law.

6. The verdict is contrary to the evidence.

7. The verdict is contrary to the law and the evidence.

* * *

APPENDIX D — EXCERPTS OF BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3989 WMS

KATHLEEN QUICK, ASSIGNEE OF
KENDRICK WILHITE

Appellee,

vs.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.

Appellant.

Appeal from the United States District Court
for the Western District of Missouri
Southern Division
Honorable Russell G. Clark, District Judge

BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

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* * *

Missouri law does not recognize a claim of bad faith outside the insurance company and insured context. In fact, counsel has found no Missouri cases that recognize the tort cause of action of bad faith in the noninsurance context. Although recognized in California, courts outside of California have almost unanimously refused to apply the tort claim of bad faith in the noninsurance situation. *See* Alabama, *Peninsular Life Ins. Co. v. Blackmon*, 476 So. 2d 87 (Ala 1985); Colorado, *Strey v. Hunt Int'l Resources Corp.*, 749 F.2d 1437 (10th Cir. 1984); Illinois, *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335 (7th Cir. 1983); Nevada, *Aluevich v. Harrah's*, 660 P.2d 986 (Nev. 1983), *cert. denied*, 465 U.S. 1006 (1984); New York, *French American Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp 1352 (S.D.N.Y. 1985); Ohio, *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111 (6th Cir. 1976); Pennsylvania, *Iron Mountain Sec. Storage Corp. v. American Specialty Foods. Inc.*, 457 F.Supp. 1158 (E.D. Pa. 1978); Texas, *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944 (Tex. 1984); Wisconsin, *Jack Walters & Sons Corp. v. Morton Bldg.*, 737 F.2d 698 (7th Cir. 1984).

Assuming arguendo, that Agency is not a rental car company, but rather a liability insurer, and Quick could jump that essential first hurdle, her claim still must fail as she did not establish the four elements of a claim of bad faith under Missouri law.

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* * *

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* * *

III. THE JUDGMENT IN FAVOR OF PLAINTIFF SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF AGENCY BECAUSE THE TRIAL COURT ERRED BY OVERRULING AGENCY'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL, BECAUSE PLAINTIFF DID NOT HAVE STANDING TO PROSECUTE CLAIMS OF KENDRICK WILHITE UNDER MISSOURI LAW, AND THEREFORE, NO CAUSE OF ACTION WAS BEFORE THE COURT AND THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND ANY ACTION WHICH THE COURT TOOK WAS NULL AND VOID.

The tort of bad faith refusal to settle is not assignable under Missouri common law. *State ex rel Park Nat. Bank v. Globe Indemnity Co.*, 61 S.W.2d 733, 736 (Mo. 1933). There have been two situations in which the courts have allowed the common law rule of nonassignability of torts to be circumvented by holding that there is support in the Bankruptcy Code or the Probate Code that would support their assignability. In *Ganaway*, the court stated that the 1978

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Bankruptcy Act supports the proposition that the bad faith cause of action is assignable. *Ganaway v. Shelter Mutual Insurance Company*, 795 S.W.2d 554 (Mo.App.S.D. 1990). The court stated that since "all legal or equitable interests of the debtor" become part of the estate in bankruptcy, then the cause of action is capable of being assigned. *Ganaway v. Shelter Mutual Insurance Company*, 795 S.W.2d at 564 (citing 11 U.S.C.A. Sec. 541 (a)(1) (West 1979)). This legal fiction has no application to this suit. Clearly a claim for personal injuries in Missouri survives to the injured/bankrupt's estate. However, that same injured person could not sell or assign his personal injury claim to another individual or a corporation outside of bankruptcy. Furthermore, the trustee in bankruptcy cannot put the personal injury claim for sale or assignment to the highest bidder.

Other courts have held that the test for assignability of a claim is simply a question of whether the claim could or would survive the death of the injured person and be available to a personal representative. They have held if the claim would survive to the personal representative, it is assignable. *Emmendorfer v. Crader Tire & Retread Service*, 670 S.W.2d 548 (Mo.App. 1984), (citing *State ex rel. Park Nat. Bank v. Globe Indemnity Company*, 61 S.W.2d 733, 735 (Mo. 1933)). This legal fiction also does not hold true under Missouri law. While an injured party's claim survives to his personal representative, the same claim could not be put on the auction block by the injured party prior to their death. Moreover, the personal representative cannot sell this cause of action even though it becomes part of the decedent's estate.

Therefore, since the purported assignment was invalid, plaintiff had no standing to bring to bring a claim in the name

of Wilhite for the tort of bad faith, and any action that the court took was null and void as that claim was not properly before the court.

IV. A. IN THE ALTERNATIVE, THE JUDGMENT IN FAVOR OF PLAINTIFF SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF AGENCY BECAUSE THE TRIAL COURT ERRED BY OVERRULING AGENCY'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL:

A. BECAUSE PLAINTIFF: DID NOT HAVE STANDING TO BRING A CLAIM FOR PUNITIVE DAMAGES UNDER MISSOURI LAW AND THEREFORE, THAT CAUSE OF ACTION WAS NOT BEFORE THE COURT AND THE TRIAL COURT AGREED SUBJECT MATTER JURISDICTION WITH THAT CLAIM AND ANY ACTION THE COURT TOOK WITH REGARD TO PUNITIVE DAMAGES AS NULL AND VOID; AND THE CAUSE OF ACTION THAT WAS PURPORTEDLY ASSIGNED FOR PUNITIVE DAMAGES WAS INVALID BECAUSE PUNITIVE DAMAGES IN THIS CASE ARE PURELY PERSONAL IN NATURE AND WERE NOT REDUCED TO A JUDGMENT AND THEREFORE THE ASSIGNEE COULD NEVER BE ASSIGNED THAT CLAIM UNDER MISSOURI LAW; AND,

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* * *

In both law and equity, a cause of action sounding in tort cannot be assigned. Missouri's common law prohibits the assignment of causes "for torts for personal injuries, and for wrongs done to the person, the reputation or the feelings of the injured party, and those based on contracts of a purely personal nature . . ." *State ex rel Park Nat. Bank v. Globe Indemnity Co.*, 61 S.W.2d 733, 736 (Mo. 1933).

In this case, plaintiff Kathleen Quick did not have standing in this suit to bring a claim of punitive damages against Agency. Again, personal injury causes of action in Missouri, as in most jurisdictions, are not assignable. *Marshall v. Northern Assurance Co. of America*, 854 S.W.2d 608 (Mo.App. 1993); *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Mo.App. 1965); *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205 (Mo.App. 1970); and *Jones v. Aetna Casualty & Sur. Co.*, 497 S.W.2d 809 (Mo. App. 1973). A complaint "which pleads such an assignment does not plead a cause of action." *Chuning v. Calvert*, 452 S.W.2d 580, 584 (W.D. 1970). A complaint that does not plead a cause of action:

> is insufficient to call into being the court's jurisdiction. A verdict will not cure such a [complaint] and no valid judgment can be entered upon it, and if entered, cannot be enforced.

452 S.W.2d at 584.

While courts have acknowledged the nonassignability of a personal injury action, some courts have made a distinction

between an assignment of the action itself and the assignment of a claim in which the damages are liquidated and reduced to a judgment. *Marshall v. Northern Assurance Co. of America*, 854 S.W.2d at 610 (Mo.App. 1993).

In the instant case, although the assignor Wilhite may have been able to argue a claim of punitive damages to the jury himself, his assignee, Kathleen Quick, did not have standing to prosecute Wilhite's claim in this regard. Any claim for punitive damages is "purely personal" and cannot be assigned. The same is true if the assignee attempted to bring a claim on behalf of Wilhite for "negligent infliction of emotional distress," as Missouri law prohibits the assignability of such a personal claim not reduced to a judgment. *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208 (Mo.App. 1965).

Unliquidated claims for punitive damages and other purely personal torts have also been held not assignable by courts in California, which has been at the forefront of the tort of bad faith and has extended the bad faith cause of action to first party and commercial breach of contract scenarios. *Reichert v. General Insurance Company of America*, 68 Cal.2d 822, 834 (1968). *Dugar v. Happy Tiger Records Inc.*, 41 . . .

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In this diversity action, the trial court must correctly state the law in the jury instructions and the verdict director must properly set forth the elements of the plaintiff's prima facie case and inform the jury of the proper legal standard. *Bersett v.*

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K-Mart Corporation, 869 F.2d 1131, 1135 (8th Cir. 1989); *Robinson v. Monsanto Company*, 758 F.2d 331, 335 (8th Cir. 1985); *Hrzenak v. White-Westinghouse Co.*, 682 F.2d 714, 719 (8th Cir. 1982).

Bad faith as a tort action was first recognized in Missouri in 1950 in the Missouri Supreme Court case of *Zumwalt et al. v. Utilities Ins. Co.*, 228 S.W.2d 750 (Mo. 1950). *Zumwalt* remains the controlling case on bad faith in the state of Missouri.

In recognizing this tort, the Court set forth the necessary criteria for recovery. The Missouri Supreme Court held:

> We have reviewed many authorities on the question and think the weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against an assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer for the amount of the judgment recovered against the insured in excess of the policy limits, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy.

Zumwalt at 753.

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In this action, there is no liability policy of insurance, or, in other words, an insurance contract which would support the giving of this instruction. (See Plaintiff's Exhibit 16 admitted into evidence). There is only an indemnity agreement. An indemnity agreement is not an a contract of insurance. *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597, 602 (Mo.App.W.D. 1986). As a result, this defendant cannot come within the confines of the principles set fort in *Zumwalt*.

In addition, the agreement between defendant and plaintiff's assignee, Wilhite, does not give defendant the *exclusive* right to contest or settle any claim brought against Wilhite. The reverse is equally true in that the agreement does not prohibit Wilhite from voluntarily assuming any liability or settling any claims without this defendant's consent, except at Wilhite's own costs.

Under the holding of *Zumwalt*, the bad faith tort recognized by the Missouri Supreme Court, by its very language, could not apply to this defendant. As a result, the instruction submitted to the jury is not a clear, concise and correct statement of the law.

The Instructions submitted to the jury improperly allowed the jury to find plaintiff's assignor's indemnitor was controlled by the confines of the bad faith principles applicable to insurance contracts, contrary to the holdings of the Missouri Supreme Court.

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Appendix D

VI. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT INSTRUCTION C AS THAT INSTRUCTION WAS SUPPORTED BY THE EVIDENCE AND PROPERLY SETS FORTH AGENCY'S RIGHT TO BE DISCHARGED UNDER ITS INDEMNITY CONTACT WITH WILHITE DUE TO WILHITE'S PREJUDICIAL CONDUCT.

Defendant tendered an instruction, which was refused, to the court which set forth the obligations of plaintiff's assignor to Agency under the rental agreement.

The rental agreement contained the following language:

> 1. Lessor will settle or defend as it considers appropriate, any claim or suit seeking damages for bodily injury and or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence. . . . The foregoing indemnification and hold harmless provisions shall be applicable only to losses arising out of the authorized use of the vehicle. . . .

See Plaintiffs Exhibit 16, The Rental Agreement, entered into evidence.

By this language, defendant complies with the Financial Responsibility Laws of Missouri. *See generally*, R.S.Mo. 303.010 et seq. The only requirement imposed on a self-insured[2] is that it will pay the same judgments in the same

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2. "Self insured," as used in the Motor Vehicle Financial Responsibility (Cont'd)

amounts as if it had issued a policy. The agreement provides, in compliance with this statute, for indemnification of Wilhite in the event of an occurrence while driving the rental vehicle. Missouri recognizes this type of indemnification agreement. *Moberly v. Leonard et al.*, 99 S.W.2d 58, 63 (Mo. 1936).

Had the Missouri legislature wished to require other obligations of a "self insured" under the Motor Vehicle Financial Responsibility Laws, it surely would have set those obligation out in the statute.

The agreement between Agency and Wilhite does several things; all of which need to be analyzed separately. The agreement obligates Agency (1) to defend or (2) to settle the claims. This obligation is controlled further by Agency's right to settle "as it considers appropriate." The agreement also sets forth that the (3) indemnification and hold harmless agreement arises only from the authorized use of the rental vehicle. The indemnification is provided as compliance with the applicable motor vehicle financial responsibility laws and is for the payment of judgments in the same amounts as an insurer.

Instruction Number 6 places additional obligations on the defendant pursuant to the indemnification agreement which are not appropriate.

In sum, Agency's obligations to Wilhite were: to defend to

(Cont'd)
Law of Missouri, is really to say "uninsured" since upon demonstrating a certain ability to pay judgments, the "self insured" is permitted to comply with the Financial Responsibility Law by being uninsured. *See generally* 303.220 R.S.Mo. 1989.

the limits of the liability protection, to settle within Agency's discretion and to indemnify and hold harmless Wilhite to the minimum financial responsibility law requirements.

None of these obligations constitute insurance or somehow transform Agency into an insurance company, particularly in light of the extensive statutory scheme in place by the Missouri Legislature controlling motor vehicle insurers. *See generally*, Revised Statutes of Missouri, Chapter 374, Department of Insurance; Chapter 375, Provisions Applicable to All Insurance Companies; Chapter 378, Fraternal Benefits Societies; Chapter 379, Insurance Other Than Life.

The obligations of the parties must be considered as parties to an indemnity contract and not as some fictional creation of an insured/insurer relationship. Contracts of indemnity are not synonymous with contracts of insurance. *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597, 602 (Mo.App.W.D. 1986), *Pennsylvania R. Co. v. Roydhouse et al.*, 110 A. 277, 278 (Pa. 1920).

This relationship of indemnitor/indemnitee creates duties on both sides of the contract, not just upon one party.

Given the indemnitor/indemnitee relationship between Wilhite and Agency, the general rule controlling the relationship comes into play. That general rule is: any act on the part of an indemnitee which materially increases the risk, or prejudices the rights, of an indemnitor, will discharge the indemnitor under the contract of indemnity. *Holiday Inns, Inc.* at 603; *American Casualty Company of Reading, Pennsylvania v. Idaho First National Bank*, 328 F.2d 138, 142-

43 (9th Cir. 1964); *Hiern v. St. Paul-Mercury Indemnity Company*, 262 F.2d 526, 529 (5th Cir. 1959); *Rochelle Bail Agency, Inc. v. Maryland National Insurance Company*, 484 F.2d 877, 878 (7th Cir. 1973).

* * *

APPENDIX E — EXCERPTS OF REPLY BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Consolidated Nos. 94-3989 and 95-1045

KATHLEEN QUICK, ASSIGNEE OF KENDRICK WILHITE

Appellee,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.

Appellant.

Appeal from the United States District Court
for the Western District of Missouri
Southern Division
Honorable Russell G. Clark, District Judge

REPLY BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

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Appendix E

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ARGUMENT.

I. AGENCY IS NOT AN INSURANCE COMPANY AND, THEREFORE, CANNOT BE HELD LIABLE FOR THE TORT OF BAD FAITH REFUSAL TO SETTLE.

Under Missouri law, only an insurance company can be held liable for the tort of bad faith refusal to settle a claim. *Compare Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 753 (Mo. 1950), *and State Farm Fire & Cas. Co. v. Metcalf, by Wade*, 861 S.W.2d 751, 756 (Mo. App. 1993), *with Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 903 (Mo. 1990). As a result, plaintiff was required to prove that Agency is an insurance company in order to prove her case for bad faith refusal to settle. *Zumwalt*, 228 S.W.2d at 753 ("**insurer**" only liable for fraud or bad faith in refusing to settle claim within the limits of the **policy**); *State Farm*, 861 S.W.2d at 756 (an element of bad faith claim is that "**insurer** refuses to settle the claim within the liability limits of the **policy**"). This plaintiff failed to do. Consequently, the district court incorrectly instructed the jury on the claim of bad faith refusal to settle. (Instruction 8). The judgment against Agency, therefore, must be reversed, and judgment entered for Agency.[2]

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2. It is indisputable that the jury returned a verdict for plaintiff on plaintiff's claim for bad faith refusal to settle. The jury awarded plaintiff (Cont'd)

Appendix E

In order to be an insurance company under Missouri law, a company must be licensed by the Missouri Department of Insurance to do insurance business in Missouri. *See State on Inf. of McKittrick v. Koon,* 201 S.W.2d 446, 452 (Mo. 1947) (person cannot engage in insurance business without complying with state statutes regulating same); *see also* 19 J. Appleman, Insurance Law & Practice § 10411, p. 261 (1982) ("No insurance company is entitled to do business within a state unless it first procures a license or certificate of authority from the state or proper administrative officials"). *See generally,* Mo. Rev. Stat. chs. 374-385 (481 pages of Missouri statutes, ranging from the general powers of the department of insurance through regulation of insurance companies and agents); *Code of State Regulation,* Tit. 20 (regulations related to the insurance laws).

The regulation of insurance companies transacting the business of insurance in the State of Missouri is broad and comprehensive and touches nearly every aspect of an insurance company's operations. To be licensed in Missouri as an insurance company requires compliance with the numerous state statutes and regulations. Missouri statutes prohibit any company from engaging in the business of insurance in this state without first complying with all provisions of the laws of

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(Cont'd)
punitive damages of $885,000, which only could have been awarded on the claim for bad faith refusal to settle. *See Landie v. Century Indemnity Co.,* 390 S.W.2d 558, 563-66 (Mo. App. 1965) (damages for failure to defend limited to contract damages; damages for bad faith refusal to settle go beyond contract damages); *Zumwalt,* 228 S.W.2d at 756 (action for insurer's bad faith refusal to settle "is a tort action"). Plaintiff's only other claim that was submitted to the jury was for breach of contract for failure to defend, and Missouri law is clear that punitive damages cannot be awarded for a breach of contract. *Peterson,* 783 S.W.2d at 902-03; *see Zumwalt,* 228 S.W.2d at 756.

this state governing the business of insurance. Mo. Rev. Stat. § 375.158 (1994).

Moreover, a company is prohibited from transacting any insurance business in Missouri until it procures from the Missouri Director of Insurance a certificate stating that it has complied with the requirements of the insurance laws of this state and is authorized to do business. Before a certificate of authority can be issued, a company that wishes to engage in the insurance business is investigated extensively by the director of insurance. *See generally,* Mo. Rev. Stat. § 375.166, 375.183, 375.201-375.226 (1994). Once the extensive requirements are met, the Missouri Director of Insurance issues a certificate of authority to do business as an insurance company in Missouri. Mo. Rev. Stat. § 375.161 (1994). These certificates of authority are renewed annually. *Id.* at § 375.161 (1994).

Plaintiff failed entirely to prove that Agency is or was an insurance company under Missouri law — and could not do so if she had tried. As is perfectly clear from the record, Agency is a car rental company, not an insurance company. Thus, plaintiff did not place in evidence any certificate issued by the Missouri Director of Insurance authorizing Agency to do insurance business in Missouri. Nor did plaintiff prove that Agency met any of the statutory requirements to do insurance business in Missouri. Plaintiff's arguments that Agency is "like an insurance company," do not prove that Agency is an insurance company. The indisputable fact is that Agency is a car rental company, not an insurance company.

Plaintiff's introduction of Agency's certificate as a self-insured under Missouri's financial responsibility law is of no

moment. "The plain purpose [of the Missouri Financial Responsibility Law] is to make sure that people who are injured on the highways may collect damage awards, **within limits**, against negligent motor vehicle operators." *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 477, 482 (Mo. 1992). The self-insured certificate does not establish that Agency is an insurance company.

"A self-insurer is not engaged in the insurance business." 19 J. Appleman, Insurance Law & Practice § 10411, p. 263 (1982). *See Reeves v. Wright & Taylor*, 220 S.W.2d 1007, 1010 (Ky. 1949) (car rental company held not to be in insurance business by complying with state financial responsibility law). As the highest court in Kentucky held in *Reeves*, under the Kentucky Motor Vehicle Safety-Responsibility Act:

> Clearly, the owner of the leased automobiles is not engaged in the insurance business when he procures a certificate of self-insurance from the Department of Revenue in lieu of a liability insurance policy. The certificate merely shows that he had produced evidence of financial responsibility.

Id.

Thus, Agency's self-insurance certificate **does not establish** that Agency was a liability **"insurer"**; it establishes exactly the opposite: that Agency was not a liability insurer. *See American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 112-14 (Mo. 1974). In American *Family*, the Missouri Supreme Court, after a careful review of the applicable sections of the Missouri Motor Vehicle Safety

Responsibility Law, held that the statutory obligations of an automobile self-insurer did not constitute insurance. *Id.* at 112-14. The Missouri Supreme Court quoted, with approval, the following pertinent passage from *Home Indemnity Co. v. Humble Oil & Refg. Co.*, 314 S.W.2d 861, 865-66 (Tex. Civ. App. 1958):

> To say that a self-insurer will pay the same judgments and in the same amounts as an insurance company would have to pay is one thing; while it is obvious that to assume all the obligations that exist under a Standard Automobile Liability Policy is quite another thing. A Standard policy calls for the assumption of many obligations other than the payment of a judgment rendered against the insured . . .

American Family, 517 S.W.2d at 114.

This Court, applying Missouri law in *St. John's Reg. Health Ctr. v. American Cas. Co.*, 980 F.2d 1222, 1224-25 (8th Cir. 1992) (Beam, J.), recently followed the Missouri Supreme Court's decision in *American Family*, and held that a group of hospitals' self-insurance plan also was not insurance. *Id.* at 1225-27. In reaching this conclusion, this Court appropriately observed that

> Determining the plain meaning of the term "insurance" is not a straightforward task, but several courts wrestling with "other insurance" clauses have noted that "[a]s a matter of common understanding, usage, and legal definition, an insurance

> contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss of members of the public at large in consideration of the payment of a premium." [Citations omitted.] **There are other sorts of risk-shifting agreements which are not insurance contracts, such as private indemnity agreements collateral to the main business or transaction between parties. . . .**

Id. at 1224.[3]

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3. The Missouri Supreme Court's decision in *American Family* and this Court's decision in *St. John's* are in accord with the majority of cases which have considered whether self-insurance is insurance. Annot., "Self-insurance against liability as other insurance within the meaning of liability insurance policy," 46 A.L.R. 4th 707, 710, § 2 (1986) ("self-insurance against liability has generally been held not to be 'other insurance' within the meaning of a liability insurance policy, although there is authority to the contrary . . .").

The Missouri appeals court decision cited by plaintiff for the proposition that self-insurance is insurance, *Heavens v. Laclede Gas Co.*, 809 S.W. 2d 162 (Mo. App. 1991), is not only contrary both to the decision of the Missouri Supreme Court in *American Family* and to the general rule set forth in the ALR annotation cited above, but also fails even to cite, let alone discuss, the contrary Missouri Supreme Court decision in *American Family*. *Heavens* thus should not be considered by this Court — which is obligated to apply Missouri law — as accurately representing Missouri law. *Forsthove v. Hardware Dealers Mut.*

(Cont'd)

The latter is precisely the situation here. Agency, as part of its car rental agreement — and collateral to the main car rental transaction between it and Wilhite — agreed to settle or defend, as it considered appropriate, any claim or suit seeking damages for bodily injury or property damage arising out of the operation of the rental car by Wilhite to the minimum amount required by the applicable motor vehicle financial responsibility law — **$25,000**. (T.R. 251; Pl. Ex. 16, p. 2, ¶ 1.) Agency did not issue any policy of automobile liability insurance to Wilhite, or agree to "insure" Wilhite. Agency's private indemnity agreement with Wilhite, like the self-insurance in *American Family* and *St. John's*, is not insurance.

As the court held in *Holiday Inns, Inc. v. Thirteen-Fifty Inv. Co.*, 714 S.W. 2d 597, 602 (Mo. App. 1986),

> Contracts of indemnity are not synonymous with contracts of insurance. . . . Had the legislature meant to include a contract of indemnification it would have so stated. The legislature is not so careless in its choice of words.

See also, Isaac H. Blanchard Co. v. Hamblin, 144 S.W. 880, 881-82 (Mo. App. 1912):

> A contract between a limited number of

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Fire Ins. Co., 416 S.W. 2d 208, 213 (Mo. App. 1967) (a court of appeals is not bound to follow the reasoning and rule of another court of appeals if such reasoning and rule are not in accord with the decisions of the Missouri Supreme Court).

> individuals, partnerships, and corporations engaged in the same line of business by which they undertake to indemnify each other against loss by fire, and do not purpose to issue policies to others not parties to the contract, is not a contract for the creation of the insurance business, within the meaning of that term as expressed in our statutes. It is to be classified as an interindemnity contract, and therefore outside the purview of the insurance law. . . .

Thus, the indemnity clause in Agency's car rental contract is **not insurance**, and Agency is not a **"liability insurer,"** as required under *Zumwalt* and *Metcalf* to be liable for the tort of bad faith refusal to settle claims. Furthermore, Agency has found no Missouri case imposing liability on a self-insured for the tort of bad faith refusal to settle, and plaintiff has cited none. Consequently, Agency cannot be held liable for that tort under Missouri law, and the judgment below should be reversed.

Although a California case *(Nathanson v. Hertz Corp.*, 227 Cal. Rptr. 799 (Cal. App. 1986)), and a Pennsylvania case *(Gavaghan v. Replacement Rent-A-Car, Inc.*, 811 F. Supp. 1077 (E.D. Pa. 1992), hold that self-insured car rental companies can be liable for the tort of bad faith refusal to settle, those cases are readily distinguishable on their facts and on special California and Pennsylvania statutes—which Missouri does not have.

In *Nathanson*, Hertz, unlike Agency here, issued a Basic

Automobile Liability Insurance Policy to its renters pursuant to the rental agreement. 227 Cal. Rptr. at 800, n. 2, 802, 803. In addition, it was undisputed that Hertz added some consideration for this coverage to the car rental, and that Hertz set aside a "reserve" for the payment of claims. 227 Cal. Rptr. at 802. There is no such evidence in this case.

Furthermore, in California, the duty of an insurance company to exercise good faith in settling claims of third parties is imposed by statute—California Insurance Code § 790.03(h) [4] 227 Cal. Rptr. at 800, n.3. Section 790.01 of the California Insurance Code imposes that statutory duty on various types of insurance companies, "as well as all other persons engaged in the business of insurance." Cal. Ins. Code § 790.01; 227 Cal. Rptr. at 800, n.3, 802. The *Nathanson* court relied on the quoted language to impose such duty on Hertz. 227 Cal. Rptr. at 802-03.

Referring to paragraph 9 of the Hertz car rental agreement, the court observed that "Hertz agree[d] to provide liability coverage For the customer 'with standard provisions of a basic automobile liability insurance policy,' " and that this "established that Hertz is collaterally and substantially engaged in the business of insurance as it relates to its own rental customers." *Id.* at 803. The court, therefore, held that Hertz could be liable under the statute for bad faith refusal to settle.

In the present case, however, plaintiff has not established

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4. The California Supreme Court later reversed its earlier position that there was a private right of action against insurers for bad faith refusal to settle under this statute. *Moradi-Shalal v. Firemen's Fund Ins. Co.*, 758 P.2d 58 (Cal. 1988).

any comparable facts or pointed to any comparable Missouri statutes. Agency did not issue a basic automobile liability insurance policy to Wilhite; Agency merely agreed to indemnify and hold him harmless up to the minimum amount required by law. Furthermore, plaintiff did not prove that Agency charged a premium for insurance as part of its rental, or that Agency established reserves for claims. Finally, plaintiff has cited no Missouri statute like California Insurance Code Section 790.01, imposing a statutory duty of good faith upon "all other persons engaged in the **business of insurance.**" As a result, *Nathanson* likely would not be followed by the Missouri Supreme Court, particularly in view of the Missouri Supreme Court's decision in *American Family. Nathanson,* therefore, should not be applied by this Court in this case.

Likewise in *Gavaghan,* a specific Pennsylvania statute (42 Pa. Cons. Stat. § 8371) "create[d] a private cause of action for bad faith conduct by an insurer against an insured." 811 F.Supp. at 1079. "Although the Pennsylvania Supreme Court has yet to address this precise issue *(Id.* at 1081)," the *Gavaghan* court held that it would apply section 8371 to self-insureds because other decisions showed that "Pennsylvania courts refuse to distinguish between self insureds, and those with a policy of insurance when to do so denies an injured party coverage simply because of a vehicle owner's choice to self insure." *Id.* at 1082.

The Missouri Supreme Court, however, treats self-insureds as self-insureds, not as insurance companies. *American Family,* 517 S.W.2d at 112-14; *see St. John's,* 980 F.2d at 1224-27. The majority rule of other states is the same in cases deciding whether self-insurance constitutes "other insurance." 46 A.L.R. at 710 ("self-insurance against liability

has generally been held not to be 'other insurance' within the meaning of a liability insurance policy, although there is authority to the contrary . . .").[5] Accordingly, *Gavaghan is* based on Pennsylvania decisions that are contrary to the controlling decision of the Missouri Supreme Court, as well as the majority rule of other states. *Gavaghan*, therefore, likely would not be followed by the Missouri Supreme Court, and should not be followed by this Court.

Accordingly, this Court should hold that Agency is not an insurance company and, therefore, cannot be held liable for the tort of Bad faith refusal to settle under Missouri law. Because the district court incorrectly submitted plaintiff's case to the jury on the tort theory of bad faith refusal to settle, and the jury clearly found for plaintiff on that basis, since it awarded punitive damages which otherwise were not permissible in this case, this Court should reverse the judgment below and enter judgment for Agency.[6]

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5. The following cases are cited in support: *Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So.2d 730 (Ala. 1970); *Southeast Title & Ins. Co. v. Collins*, 226 So.2d 247 (Fla. App.), *cert. denied*, 232 So.2d 180 (Fla. 1969); *Home Indem. Co. v. Humble Oil & Rfg. Co.*, 314 S.W.2d 861 (Tex. Civ. App.), *aff'd*, 317 S.W.2d 515 (Tex. 1958); *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110 (Mo. 1974); *United Nat. Ins. Co. v. Philadelphia Gas Works*, 289 A.2d 179 (Pa. Super. 1972); *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550 (Tex. 1970); *St. John's Regl. Health Ctr. v. American Cas. Co.*, 980 F.2d 1222 (8th Cir, 1992) (Mo. law); *Wake Cty. Hosp. Sys., Inc. v. National Cas. Co.*, 804 F. Supp. 768 (E.D.N.C. 1992), *aff'd*, 1993 U.S. App. Lexis 15159 (4th Cir. 1993); *Aetna Cas. & Sur. Co. v. James J. Benes & Assoc., Inc.*, 593 N.E.2d 1087 (Ill. App.), *app. denied*, 602 N.E.2d 445 (Ill. 1992).

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6. Although plaintiff may argue that the reversal of the judgment below only on her bad faith tort theory entitles her to a new trial on her remaining breach of contract claim, plaintiff's assignor's failure to cooperate with Agency

(Cont'd)

Appendix E

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IV. WILHITE'S CLAIMS FOR THE TORT OF BAD FAITH AND FOR PUNITIVE DAMAGES WERE NOT ASSIGNABLE TO PLAINTIFF UNDER MISSOURI LAW, AND THEREFORE PLAINTIFF HAD NO SUCH CLAIMS.

A claim for bad faith refusal to settle is a tort claim for personal injuries. *Zumwalt*, 228 S.W.2d at 756; *Landie*, 390 S.W.2d at 565. While a claim for breach of contract is assignable under Missouri law, a tort claim "based upon wrongful or negligent acts resulting in personal injuries" is not. *Freeman v. Berberich*, 60 S.W.2d 393, 401 (Mo. 1933). Indeed, an attempt to transfer an unliquidated tort claim for personal injuries is void and unenforceable as against the public policy of Missouri. *Forsthove* v. *Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 212-18 (Mo. App. 1967); *Chuning v. Calvert*, 452 S.W.2d 580, 584-85 (Mo. App. 1970); *Travelers Indemnity Co. v. Chumbley*, 394 S.W.2d 418, 423 & n. 12 (Mo. App. 1965). Accordingly, the district court erred in submitting plaintiff's bad faith refusal and punitive damage claims to the jury, and this Court should reverse the judgment below and enter judgment for Agency.[10]

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in connection with the underlying Quick lawsuit forecloses that claim, and thus a new trial would not be warranted. See discussion under point III below.

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10. See discussion in note 6 above.

Appendix E

Plaintiff again cites *Ganaway,* this time for the proposition that a claim for bad faith against an insurance company is assignable. (Apee. Br. at 32.) Although *Ganaway* may so hold, it should not be followed by this Court. That holding in *Ganaway is* based upon an incorrect analysis of what interests of a debtor in bankruptcy become part of the bankrupt's estate under federal bankruptcy law, and on the "general law" of other states, which is contrary to the Missouri law cited above. 795 S.W.2d at 564-65.

The bankruptcy law analysis is faulty: bankruptcy courts sitting in Missouri have not allowed unliquidated personal injury tort claims to become a part of the bankruptcy estate. *In re Mitchell,* 73 B.R. 93, 95 (Bankr.E.D.Mo. 1987) (personal injury claims); *In re Scarlett,* 121 B.R. 578, 579-81 (W.D. Mo. 1990) (legal malpractice claim); *In re Shahzad,* 147 B.R. 34, 36-37 (Bankr.E.D.Mo. 1992) (claims for mental anguish, humiliation, embarrassment, and damage to credit reputation as a result of wrongful payment of check on forged endorsement); *In re Winters,* 424 F.Supp 1389, 1390 (E.D. Mo. 1975) *("Ex Delicto* unliquidated claims for personal injuries . . . do not vest in a trustee in bankruptcy"). Missouri courts have similarly held that debts for which an attachment may issue must possess an actual character and not be merely possible, dependent on a contingency that may never happen. *State Government Employees Ins. Co. v. Lasky,* 454 S.W.2d 942, 950 (Mo.App. 1970) ("It would be difficult to imagine a so-called indebtedness more contingent and speculative than an action for personal injuries resulting from the alleged negligence of a defendant").

Moreover, the "general law" of other states cited by the *Ganaway* court is contrary to the Missouri law set forth in the

cases cited above. As a result, *Ganaway* should not be followed. *Forsthove,* 416 S.W.2d at 213 (court of appeals is not bound to follow rule announced by another court of appeals when that rule is not in accord with the decisions of the Missouri Supreme Court).

Plaintiff also cites *State ex rel. Park Nat. Bank v. Globe Indemnity Co.,* 61 S.W.2d 733 (1933), asserting that it "actually sets forth a rule indicating in all instances a claim for bad faith asserted against a liability insurer is assignable." (Apee. Br. at 32.) *Globe Indemnity* does nothing of the sort. *Globe Indemnity* does not even deal with the tort of bad faith refusal to settle; it deals instead with a claim on a notary's bond for negligent acknowledgement of a deed of trust. 61 S.W.2d at 734.

Indeed, the language of *Globe Indemnity* cited by plaintiff (Apee. Br. at 32-33) actually supports the contrary proposition: that the purely personal tort of bad faith is not assignable. Thus, the Missouri Supreme Court held, at the end of the passage quoted by plaintiff:

> "Practically the only classes of choses in action which are not assignable are those for torts for personal injuries, and for wrongs done to the person, the reputation, or the feelings of the injured party, . . ."

61 S.W.2d at 736, quoting from 2 R.C.L. 596, § 3.

Plaintiff then cites *State ex rel. Smith v. Greene,* 494 S.W.2d 55 (Mo. 1973), for the proposition that a claim for punitive damages also is assignable. (Apee. Br. at 33.)

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Plaintiff's reliance on *Greene* is seriously mistaken. *Greene* did not hold that a claim for punitive damages is always assignable, as plaintiff asserts. *Greene* held, instead, that where a cause of action for which punitive damages might be recovered survives the death of the plaintiff, the claim for punitive damages survives as well. *Id.* at 60. Furthermore, in that case, the cause of action was a statutory cause of action for double damages for destruction of personal property (Mo. Rev. Stat. § 537.330), not a cause of action for personal injury, and another statute (Mo. Rev. Stat. § 537.010) expressly provided that the action could be brought by the executor or administrator of the injured party after his death. 494 S.W.2d at 57-58. Thus, *Greene* is wholly inapplicable here. And, even if it were applicable, it would not support the assignment of Wilhite's claim for punitive damages, because the underlying claim for bad faith refusal to settle is not *assignable,* in any event, for the reasons stated above.

Plaintiff further relies on *Eastern Atlantic Transp. & Mech. Eng., Inc. v. Dingham,* 727 S.W.2d 418 (Mo. App. 1987), to support her argument that Wilhite's punitive damage claim is assignable. (Apee. Br. at 33.) Another court has analyzed the reasoning in *Eastern Atlantic,* and found it to be contrary to Missouri common law and statutes:

> The Trustee has cited *Eastern Atlantic Transportation and Mechanical Engineering, Inc. v. Dingham,* 727 S.W.2d 418 (Mo. App. W.D. 1987), which held that a claim for punitive damages against an escrow agent for breach of fiduciary duty is assignable. The escrow agent breached his fiduciary duty by failing to collect and

> distribute funds as he was obligated to do by the terms of the escrow agreement. The court stated that "[t]he test used to determine whether a cause of action is assignable is whether or not it would survive to the personal representative." *Id.* at 423. The *Eastern Atlantic* court's assignability survivability test (which is quite the old common law test) would lead to the conclusion that even claims for personal injuries are assignable because such claims survive, by statute, the death of the tort victim. R.S.Mo. 537.020. As previously discussed, however, in *Globe Indemnity* the Missouri Supreme Court prohibited the assignment of such claims which are not repudiated by the enactment of § 537.020. **While the result reached in *Eastern Atlantic* may be sound, that court's analysis does not square with well established Supreme Court precedent.**

Scarlett v. Barnes, 121 B.R. 578, 581 (W.D. Mo. 1990) (emphasis added). Because *Eastern Atlantic is* not in accord with "well-established Supreme Court precedent," it need not be followed by a Missouri Court of Appeals and, therefore, should not be followed by this Court. *Forsthove,* 416 S.W.2d at 208.

Consequently, while Wilhite's claim for breach of contract was assignable, his bad faith tort claim and punitive damage claim were not. Therefore, the verdict has been tainted by the improper admission of evidence and the submission of

erroneous legal theories to the jury. As a result, this Court should reverse the judgment below and, for the reasons stated above (see note 6 above), should enter judgment for Agency.

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